Woolley Development Sdn Bhd v Mikien Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–10 OF 2007
TENGKU BAHARUDIN SHAH, ZALEHA ZAHARI AND ABDULL HAMID EMBONG JJCA
30 OCTOBER 2007

Civil Procedure — Summary judgment — Principles and procedure — Duty of judge — Whether judge to critically examine assertions of fact to determine if factual dispute in existence

Civil Procedure — Summary judgment — Rescission of agreement — Application under O 81 of the Rules of the High Court 1980 — Principles and procedure — Whether principles applicable for O 14 summary judgment applicable to O 81 summary judgment — Rules of the High Court 1980 O 14 & O 81

Contract — Privity — Sale and purchase agreement — Agreement executed between developer and purchaser — Agreement providing for developer's successor in title or assigns to be bound by terms of agreement — Project abandoned and rehabilitating developer taking over project from initial developer — Whether rehabilitating developer bound by terms of agreement between purchaser and initial developer — Whether there was privity of contract between rehabilitating developer and purchaser

Land Law — Housing developers — Sale and purchase agreement — Agreement providing for developer's successor in title or assigns to be bound by terms of agreement — Project abandoned and rehabilitating developer taking over project from initial developer — Whether rehabilitating developer bound by terms of agreement between purchaser and initial developer — Whether there was privity of contract between rehabilitating developer and purchaser

The first defendant was the registered and beneficial owner of certain lands and intended to develop a commercial-cum-office project on the said lands. The plaintiff through 12 sale and purchase agreements ('SPA') purchased several units in the said project. The plaintiff paid in full to the first defendant the purchase price amounting to some RM2.3m for the units. The SPA inter alia provided for the first defendant to hand over vacant possession of the

units to the plaintiff within 36 calendar months from the date of the SPA. Upon a failure by the first defendant to deliver the units timeously, the plaintiff was to be paid liquidated damages, calculated on a daily basis, at the rate of 11% per annum of the total purchase price of the units. Further, time was to be of essence and the SPA was to bind all the first defendant's successors in title and permitted assigns. The first defendant failed to deliver the units in time and in fact abandoned the project. On 20 September 2000, in an attempt to rehabilitate the project, the first and second defendants entered into a transfer agreement ('the TA'), wherein the first defendant transferred the said lands to the second defendant, subject to existing charges, without any monetary consideration. The TA acknowledged that the first defendant had entered into SPAs with individual purchasers. Details of such purchasers were described in Annexure H of the TA. The TA also envisaged the execution of novation agreements, between the defendants and the individual purchasers. The plaintiff's details were however not acknowledged in Annexure H. The plaintiff lodged caveats to protect its interest, which the second defendant became aware of. On 16 January 2006 the plaintiff filed an action against the first and second defendants, by which it sought for an order for specific performance of the 12 SPAs, and liquidated damages at the rate of 11% of the total purchase price. Alternatively, it sought for rescission of the 12 SPAs, and restitution of the total purchase price including interest at the rate of 11% on the total purchase price. On 24 April 2006, the plaintiff applied for summary judgment under O 81 of the Rules of the High Court 1980 ('the RHC') against the defendants. The plaintiff elected to seek rescission, rather than specific performance, and other consequential orders. At first instance, the High Court allowed the application. The second defendant appealed to the Court of Appeal. On appeal, counsel for the second defendant submitted: (i) there was no contractual relationship between the plaintiff and the second defendant — the purchase price was paid to the first defendant and not to the second defendant; (ii) since the plaintiff was not listed as a purchaser in Annexure H to the TA, the second defendant had not been put to notice of the plaintiff's alleged interest in the said lands; (iii) a novation agreement had not been executed between the defendants and the plaintiff.

Held, dismissing the appeal by majority decision:

(1) (per **Abdul Hamid Embong JCA**, **Tengku Baharudin Shah JCA** concurring) The principles to guide a judge in deciding whether or not to grant a summary judgment were succinctly summarized by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 which accepted and applied the principle as enunciated by the Privy Council in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (see paras 40–41).

(2) (per **Abdul Hamid Embong JCA**, **Tengku Baharudin Shah JCA** concurring) When an issue of fact is raised in an affidavit opposing an application for a summary judgment the trial judge thus is duty bound not to merely accept it superficially and in a cursory manner. He is not bound to accept any allegation uncritically. In exercising his judicial discretion the judge is obliged to critically examine any assertion of fact to determine if it were a bona fide factual dispute worthy of determination at a full trial (see para 42).

(3) (per **Abdul Hamid Embong JCA**, **Tengku Baharudin Shah JCA** concurring) The summary judgment procedure under O 14 of the RHC is not intended to shut out a defendant and should only be exercised in clear cases. This principle should be applicable in the instant case under O 81 of the RHC. The philosophy behind the summary judgment procedure is that a plaintiff should not be put through the long-drawn and costly process of a full trial in an action against a defendant who is without a bona fide defence (see para 44); *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 followed.

(4) (per **Abdul Hamid Embong JCA**, **Tengku Baharudin Shah JCA** concurring) The plaintiff in a summary judgment application under O 81 of the RHC first needs to establish a prima facie case that 'he is entitled to judgment'. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him. The word 'ought' in O 81 r 3 of the RHC, is an expression of a strong probability. In other words, the issue in dispute must be critically investigated and be determined as genuine. This is what the defendant needs to prove to be entitled to a trial of that disputed issue. A judge in allowing summary judgment under O.81 of the RHC, does so in the exercise of his discretionary jurisdiction. If an appellate court finds that this discretion had been judicially exercised, in the sense that he had properly evaluated the facts to find no arguable case, and had not been wrong in law or erred in principle, then the judge's decision should not be disturbed (see paras 46–47); *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 302; *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; *Eng Mee Yong & Ors v Letchumanan* and *Doshi v Yeoh Thiong Lay* [1975] 1 MLJ 85 referred.

(5) (per **Abdul Hamid Embong JCA**, **Tengku Baharudin Shah JCA** concurring) In the instant appeal, the judicial commissioner in the High Court had correctly approached the application by minutely considering and evaluating all the relevant documents and facts in coming to her decision. The judicial commissioner had properly exercised her discretion in allowing the plaintiff's application and her finding should not be disturbed (see para 49).

(6) (per **Abdul Hamid Embong JCA**, **Tengku Baharudin Shah JCA** concurring) In the instant case, the second defendant had never disputed it was the successor in title and the permitted assign of the first defendant. The second defendant was thus bound by the terms of the SPA. It did not also matter that the plaintiff's name was not listed in Annexure H to the TA. The plaintiff had paid the full purchase price for the units and was merely exercising its remedies in respect of the non-delivery of its purchased units. To say that there was no privity of contract between the plaintiff and the second defendant was untenable (see paras 50–51).

(7) (per **Abdul Hamid Embong JCA**, **Tengku Baharudin Shah JCA** concurring) The novation point was one of fact and not of law. The second defendant had failed to fulfill its obligation under the TA to prepare the novation agreement within 30 days of signing it with the first defendant. In any event, this was a fact not argued before the High Court and it should not be raised on appeal (see para 52); *Maharlal Bhaichand Gathani v Perwira Habib Bank Malaysia Bhd* [2002] 1 CLJ 449 referred.

(8) (per **Abdul Hamid Embong JCA**, **Tengku Baharudin Shah JCA** concurring) The plaintiff's private caveats under the NLC constituted notice to the whole world that it had a claim or an interest in the lands. The second defendant was aware of those caveats and could not now plead ignorance (see para 53); *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976]1 MLJ 169 referred.

(9) (per **Zaleha Zahari JCA** dissenting) There were clearly issues to be tried in the instant case. Liability of the second defendant towards the purchasers of properties from the original developer, to which the second defendant was not a party of, could not totally be ignored, especially when read in the context of the plaintiff not being listed as one of the purchasers of the first defendant in Annexure H to the TA (seepara 27).

(10)(per **Zaleha Zahari JCA** dissenting) The mere fact that the TA had been executed between the first defendant and the second defendant did not per se make the second defendant jointly and severally liable towards the plaintiff for breaches committed by the first defendant in the first instance. The TA must be read in context of terms agreed upon, as between the original developer, the rehabilitating developer, as well as the particular purchaser concerned. The non listing of the plaintiff in Annexure H, as well as the fact that there had been no novation of the agreement as envisaged by the TA, clearly had an impact on the issue of whether the second defendant was liable towards an unfortunate purchaser caught in such situation (see para 28).

(11) (per **Zaleha Zahari JCA** dissenting) This was not an appropriate case for summary judgment to be entered against the second defendant. There were bona fide issues to be tried as far as the plaintiff's claim against the second defendant was concerned (see para 29).

[Bahasa Malaysia summary

Defendan pertama merupakan pemilik berdaftar dan benefisiari tanah tertentu dan berhasrat untuk membangunkan satu projek komersial yang juga pejabat atas tanah-tanah tersebut. Plaintif melalui 12 perjanjian jual beli ('PJB') telah membeli beberapa unit dalam projek tersebut. Plaintif telah membayar sepenuhnya kepada defendan pertama harga belian berjumlah RM2.3j untuk unit-unit tersebut. PJB tersebut antara lain memperuntukkan defendan pertama menyerahkan milikan kosong unit-unit tersebut kepada plaintif. dalam tempoh 36 bulan kalendar daripada tarikh PJB itu. Jika terdapat kegagalan oleh defendan pertama untuk menyerahkan unit-unit tersebut mengikut masa yang ditetapkan, plaintif perlu dibayar ganti rugi jumlah tertentu, dikira atas dasar harian, pada kadar 11% setahun bagi harga belian keseluruhan unit-unit tersebut. Tambahan pula, masa adalah inti pati dan PJB tersebut mengikat kesemua pengganti defendan dalam hak milik dan serahhak yang dibenarkan. Defendan pertama telah gagal untuk menyerahkan unit-unit dalam masa yang ditetapkan dan sebenarnya telah menghentikan projek tersebut. Pada 20 September 2000, dalam percubaan untuk pemulihan projek, defendan-defendan pertama dan kedua memasuki satu perjanjian pemindahan ('PP'), di mana defendan pertama telah memindahkan tanah tersebut kepada defendan kedua, tertakluk kepada caj yang wujud, tanpa apa-apa balasan wang. PP tersebut mengesahkan bahawa defendan pertama telah memasuki PJB tersebut dengan pembeli-pembeli berasingan. Butir-butir pembeli-pembeli tersebut dinyatakan dalam Lampiran H PP. PP tersebut juga membayangkan penyempurnaan perjanjian novasi, antara defendan-defendan dan pembeli-pembeli berasingan. Butir-butir plaintif bagaimanapun tidak disahkan dalam Lampiran H. Plaintif telah memasukkan kaveat-kaveat untuk melindungi kepentingannya, yang mana defendan kedua telah menyedarinya. Pada 16 Januari 2006 plaintif telah memfailkan satu tindakan terhadap defendan-defendan pertama dan kedua, yang mana ia memohon satu perintah pelaksanaan spesifik untuk 12 PJB tersebut, dan ganti rugi jumlah tertentu pada kadar 11% atas jumlah harga belian. Secara alternatif, ia memohon untuk pembatalan 12 PJB tersebut, dan pembatalan jumlah harga belian termasuk faedah pada kadar 11% atas jumlah harga belian. Pada 24 April 2006, plaintif telah memohon penghakiman terus di bawah A 81 Kaedah-Kaedah Mahkamah Tinggi 1980 ("KMT') terhadap defendan-defendan. Plaintif telah memilih untuk memohon pembatalan, dan bukan pelaksanaan spesifik, dan perintah-perintah penting lain. Pada mulanya, Mahkamah Tinggi telah

membenarkan permohonan tersebut. Defendan kedua telah memohon ke Mahkamah Rayuan. Semasa rayuan, peguam bagi pihak defendan kedua telah berhujah: (i) tidak terdapat apa-apa hubungan kontraktual antara plaintif dan defendan kedua — harga belian telah dibayar kepada defendan pertama dan bukan kepada defendan kedua; (ii) Memandangkan plaintif tidak disenaraikan sebagai pembeli dalam Lampiran H kepada PP tersebut, defendan kedua tidak diberikan notis tentang kepentingan plaintif yang dikatakan itu ke atas tanah-tanah tersebut; (iii) satu perjanjian novasi tidak disempurnakan antara defendan-defendan dan plaintif.

Diputuskan, menolak rayuan melalui keputusan majoriti:

(1) (oleh **Abdul Hamid Embong HMR**, **Tengku Baharudin Shah HMR** bersetuju) Prinsip-prinsip untuk membantu hakim dalam memutuskan sama ada atau tidak memberikan penghakiman terus telah diringkaskan oleh Mahkamah Agong dalam *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 yang telah menerima dan menggunakan prinsip-prinsip seperti yang dinyatakan oleh Privy Council dalam *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (lihat perenggan 40–41).

(2) (oleh **Abdul Hamid Embong HMR**, **Tengku Baharudin Shah HMR** bersetuju) Apabila satu isu fakta ditimbulkan dalam satu afidavit menentang satu permohonan untuk penghakiman terus hakim perbicaraan oleh itu adalah terikat untuk bukan hanya menerimanya pada zahirnya dan secara sepintas lalu. Beliau tidak terikat untuk menerima apa-apa pengataan secara tidak kritis. Dalam melaksanakan budi bicara kehakimannya hakim hendaklah secara kritis memeriksa apa-apa penegasan fakta untuk menentukan sama ada ia merupakan satu pertikaian faktual bona fide yang wajar ditentukan di perbicaraan penuh (lihat perenggan 42).

(3) (oleh **Abdul Hamid Embong HMR**, **Tengku Baharudin Shah HMR** bersetuju) Prosedur penghakiman terus di bawah A 14 KMT tidak berniat untuk mengenepikan defendan dan hanya patut digunakan dalam kes-kes yang nyata. Prinsip ini hendaklah terpakai dalam kes semasa di bawah A 81 KMT. Falsafah untuk prosedur penghakiman terus adalah bahawa plaintif tidak patut diletakkan dalam proses perbicaraan penuh yang berpanjangan dan mahal dalam satu tindakan terhadap defendan yang tiada pembelaan bona fide (lihat perenggan 44); *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 diikut.

(4) (oleh **Abdul Hamid Embong HMR**, **Tengku Baharudin Shah HMR** bersetuju) Plaintif dalam satu permohonan penghakiman terus

di bawah A 81 KMT terlebih dahulu perlu membuktikan satu kes prima facie bahawa 'he is entitled to judgment'. Beban kemudian berpindah kepada defendan untuk memuaskan mahkamah kenapa penghakiman tidak patut diberikan terhadapnya. Perkataan 'ought' dalam A 81 k 3 KMT, merupakan satu kemungkinan besar. Dalam erti kata lain, isu yang dipertikaikan perlu disiasat sewajarnya dan ditentukan sebagai suatu yang asli. Ini adalah apa yang defendan perlu buktikan untuk diberi hak kepada suatu perbicaraan berhubung isu yang dipertikaikan. Seorang hakim dalam membenarkan penghakiman terus di bawah A 81 KMT, berbuat demikian dalam melaksanakan bidang kuasa berdasarkan budi bicaranya. Sekiranya satu mahkamah rayuan mendapati bahawa budi bicara ini telah dilaksanakan menurut kuasa kehakiman, dalam erti kata bahawa beliau telah meneliti fakta-fakta dan mendapati tiada kes untuk dibicarakan, dan tidak salah di segi undang-undang atau tersilap prinsip, maka keputusan hakim tidak patut diganggu (lihat perenggan 46–47); *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 302; *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; *Eng Mee Yong & Ors v Letchumanan* dan *Doshi v Yeoh Thiong Lay* [1975] 1 MLJ 85 dirujuk.

(5) (oleh **Abdul Hamid Embong HMR**, **Tengku Baharudin Shah HMR** bersetuju) Dalam rayuan semasa, pesuruhjaya kehakiman di Mahkamah Tinggi dengan betul meneliti permohonan tersebut dengan mempertimbangkan dengan terperinci dan menilai semua dokumen-dokumen dan fakta-fakta yang relevan untuk tiba kepada keputusannya. Pesuruhjaya kehakiman tersebut dengan betul menggunakan budi bicaranya dengan membenarkan permohonan plaintif dan penemuannya tidak patut diganggu (lihat perenggan 49).

(6) (oleh **Abdul Hamid Embong HMR**, **Tengku Baharudin Shah HMR** bersetuju) Dalam kes semasa, defendan kedua tidak pernah mempertikaikan ia merupakan pengganti hak milik dan penyerah hak rasmi defendan pertama. Defendan kedua oleh itu terikat dengan terma-terma PJB tersebut. Ia juga tidak penting bahawa nama plaintif tidak disenaraikan dalam Lampiran H kepada PP tersebut. Plaintif telah membayar harga belian sepenuhnya untuk unit-unit tersebut dan hanya menggunakan remedi-remedinya berkaitan unit-unit beliannya yang tidak diserahkan kepadanya. Untuk mengatakan tiada priviti kontrak antara plaintif dan defendan kedua tidak dapat dipertahankan (lihat perenggan 50–51).

(7) (oleh **Abdul Hamid Embong HMR**, **Tengku Baharudin Shah HMR** bersetuju) Perkara novasi merupakan satu fakta dan bukan undang-undang. Defendan kedua telah gagal untuk memenuhi tanggungjawabnya di bawah PP tersebut untuk menyediakan perjanjian

novasi dalam tempoh 30 hari dari penandatanganan defendan pertama. Dalam apa keadaanpun, ini merupakan fakta yang tidak dihujahkan di hadapan Mahkamah Tinggi dan ia tidak patut ditimbulkan dalam rayuan (lihat perenggan 52); *Maharlal Bhaichand Gathani v Perwira Habib Bank Malaysia Bhd* [2002] 1 CLJ 449 dirujuk.

(8) (oleh **Abdul Hamid Embong HMR**, **Tengku Baharudin Shah HMR** bersetuju) Kaveat-kaveat persendirian plaintif di bawah KMT membentuk notis kepada seluruh dunia bahawa ia mempunyai tuntutan atau kepentingan ke atas tanah-tanah tersebut. Defendan kedua sedar tentang kaveat-kaveat tersebut dan tidak boleh sekarang memplidkan ia tidak tahu (lihat perenggan 53) *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976]1 MLJ 169 dirujuk.

(9) (oleh **Zaleha Zahari JCA** menentang) Sememangnya terdapat isu-isu yang jelas perlu dibicarakan dalam kes semasa. Liabiliti defendan kedua terhadap pembeli-pembeli hartanah tersebut daripada pemaju asal yang mana defendan kedua bukan merupakan satu pihaknya, patut tidak boleh tidak dihiraukan, terutama apabila membaca dalam konteks plaintif yang tidak disenaraikan sebagai salah seorang daripada pembeli defendan pertama dalam Lampiran H kepada PP tersebut (lihat perenggan 27).

(10)(oleh **Zaleha Zahari JCA** menentang) Hakikat bahawa PP tersebut telah disempurnakan antara defendan pertama dan defendan kedua tidak menjadikan secara per se defendan kedua bertanggungjawab bersesama dan berasingan terhadap plaintif untuk pelanggaran-pelanggaran yang dilakukan oleh defendan pertama pada mulanya. PP tersebut hendaklah dibaca dalam konteks terma-terma yang telah dipersetujui, iaitu antara pemaju asal, pemaju yang menjalankan pemulihan, dan juga pembeli tertentu yang berkaitan. Plaintif yang tidak disenaraikan dalam Lampiran H, dan juga fakta bahawa tiada perjanjian novasi seperti yang dibayangkan oleh PP tersebut, dengan jelas memberi kesan kepada isu berhubung sama ada defendan kedua bertanggungjawab terhadap pembeli yang malang dalam keadaan sebegini (lihat perenggan 28).

(11)(oleh **Zaleha Zahari JCA** menentang) Ini bukan merupakan satu kes yang sesuai untuk penghakiman terus diberikan terhadap defendan kedua. Terdapat isu-isu bona fide yang perlu dibicarakan berhubung tuntutan plaintif terhadap defendan kedua yang berkaitan (lihat perenggan 29).]

Notes

For a case on rescission of agreement, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7371–7372.

For cases on principles and procedure of summary judgment, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7373–7374.

For cases on sale and purchase agreement, privity, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4638–4639.

For cases on sale and purchase agreement, housing developers, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2884–2892.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (folld)
Doshi v Yeoh Thiong Lay [1975] 1 MLJ 85 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Maharlal Bhaichand Gathani v Perwira Habib Bank Malaysia Bhd [2002] 1 CLJ 449 (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (folld)
National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 302 (refd)
Ng Hee Thong v Public Bank Bhd [1995] 1 MLJ 281 (refd)
United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors [1976]1 MLJ 169 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217 (refd)

Legislation referred to

National Land Code
Rules of the High Court 1980 O 81
Rules of the Supreme Court 1957 O 14

Appeal from: Civil Suit No S4–22–43 of 2006 (High Court, Kuala Lumpur)

K Kirubakaran, Haripal Singh (Kiru & Yong) for the appellant.
Yee Tech Fah (Ong Gek Lin with him) (Yee Teck Fah & Co) for the respondent.

Zaleha Zahari JCA:

[1] This appeal is against the decision of the learned Judicial Commissioner High Court Kuala Lumpur entering summary judgment under O 81 of the Rules of the High Court 1980 ('the RHC') on the application of the respondent (the plaintiff in the court below) against Cherating Development Sdn Bhd (the first defendant in the court below, who is not a party in this appeal), and Woolley Development Sdn Bhd (the second defendant in the court below), the appellants in this appeal. In this judgment, parties will be referred as cited in the court below.

[2] The dispute in this appeal is concerned with the rights and interest of a victim of an abandoned project as against firstly, the original developer from whom the properties had been purchased and to whom the purchase price had been paid, and secondly, as against a rehabilitating developer who has taken over the abandoned project from the original developer.

[3] The judicial commissioner had on the facts of this case found no difficulty in granting an order-in-terms of the alternative prayer applied for by the Plaintiffs in encl (7). She granted an order of rescission of 12 sale and purchase agreements, all dated 28 August 1997, executed between the first defendant as vendor of the one part, and the plaintiffs, as purchaser on the other part ('the 12 agreements'). In addition to the order of rescission, the second defendant was directed, jointly or severally with the first defendant, to refund the total purchase price paid by the plaintiffs to the first defendant in respect of all of 12 agreements amounting to RM2,316,580 together with interest at 11% per annum from 28 August 1997 to date of realization.

[4] The second defendant appealed against the judgment recorded against them, which is the subject matter of this appeal. The first defendant did not. The second defendant's appeal was heard by this court on 16 May 2007 and dismissed by a majority. With respect, I was unable to agree with the majority decision and am of the view that this appeal should be allowed with costs and the case be remitted back to the High Court for trial. My reasons are as follows.

[5] An application which is the subject matter under appeal can successfully be resisted by a defendant if it can be shown that there are bona fide issues to be tried. Each case necessarily turns on its own peculiar facts. The issue for determination is whether, on the facts of this case, the second defendant had discharged the burden of establishing that there are bona fide issues to be tried, and accordingly, not an appropriate case for summary judgment to be entered against them.

[6] The background facts are as follows: The first defendant, a developer, is the registered and beneficial owner of lands held under Geran No 15113, Lot No 190, Geran No 4500 Lot No 198, Geran No 14423 Lot No 374, Geran 4501 Lot 784, Geran No 4502 Lot No 786, Geran No 4503 Lot No 788, all at Sek 2 Bandar Butterworth, Pajakan Negeri 1146 Lot No 1, Geran No 4508 Lot No 5, Geran No 13528 Lot No 6, Geran No 15167 Lot No 564 Sek 3, Bandar Butterworth, Geran No 13786 Lot No 1961, Geran No 45091 Lot No 180, Geran No 4511 Lot No 674 all at Sek 3, Bandar Butterworth, Geran Mukim No 754 Lot 117, Geran Mukim No 770 Lot No 134, Geran Mukim 757 Lot No 120, Geran Mukim 755 Lot No 118 all at Mukim 9, in the district of Seberang Perai Utara, State of Pulau Pinang ('the said lands').

A [7] The first defendant took steps to develop the said lands into a commercial centre and shop office known as 'Raja Uda Commercial Centre' ('the development project'). By the 12 agreements executed, the plaintiffs agreed to purchase, and the first defendant agreed to sell, shop offices more particularly described in the respective sale and purchase agreement ('the said B properties'), free from all encumbrances upon delivery of vacant possession subject to the terms and conditions specified therein for a total purchase price of RM2,316,580.

C [8] Clause 7 of each of the 12 agreements states that time shall be of the essence. Clause 20 provides that vacant possession of the property purchased shall be handed over to the purchaser within 36 calendar months from the date of execution of the Agreement. In the event of the first defendant failing to deliver vacant possession of the properties purchased within the stipulated period, the first defendant shall pay the plaintiffs liquidated damages to be D calculated from day to day at the rate of 11% per annum of the total purchase price of the said properties.

[9] Two clauses of the 12 agreements referred to in argument in this appeal E (which provisions were relied upon by the judicial commissioner in arriving at the conclusions which she did) reads as follows. Clause 38(f) of the agreement provides that 'vendor' includes its successors in title and permitted assigns …' and cl 41(a) provides that the agreement 'shall be binding upon the successors in title and permitted assigns of the vendor and the heirs, F personal representatives, successors in title and permitted assigns of the purchaser.'

[10] The development project in which the plaintiffs purchased the said properties was abandoned by the first defendant sometime in 1998. In year G 2000, the first defendant, the first defendant's financier (ie Malaysian Building Society Berhad ('MBSB')) and the second defendant, reached an understanding by which agreement the second defendant was to rehabilitate and complete the development project upon terms.

H [11] On 20 September 2000 the first defendant and the second defendant executed a transfer agreement ('the transfer agreement'). Recital H of the transfer agreement refers to letter dated 27 July 2000, that the first defendant was to transfer the said lands to the second defendant, subject to existing charges created in favour of MBSB, without any money consideration. Clause I 3.1 of the transfer agreement states that 'in consideration of the mutual agreements and undertakings herein set out, the parties to this agreement have granted the rights and accepted the obligations herein appearing'. By cl 3.2, the parties agreed and declared that the basic purpose of entering into the agreement was to transfer the said lands to the second defendant by

the first defendant free from encumbrances in order for the second defendant 'to rehabilitate, continue to carry out the development construction and completion of the project …'.

[12] Recital L states that the first defendant 'has by separate and individual sale and purchase agreements made with individual purchasers, details of which are more particularly described in Annexure H to the transfer agreement'. Recital K and cl 4(e) vii of the transfer agreement envisaged the execution of a novation agreement, between the first defendant, the second defendant and the first defendant's individual purchasers, such as the plaintiffs.

[13] The plaintiffs entered private caveats against the lands upon which the properties were to be erected on 24 November 2001 vide presentation No 14396/2001 under the National Land Code ('the Code').

[14] According to letter dated 18 February 2005, the second defendant intended to proceed with the subdivision of the said lands. To enable them to do so, it was necessary for the plaintiffs to remove the caveats lodged against the said lands. The correspondence exchanged between the second defendant and the plaintiffs shows that the plaintiffs were only prepared to remove the caveats lodged upon terms, by obtaining certain undertakings on the part of the second defendant, which the second defendant failed to do.

[15] On 16 January 2006 the plaintiffs filed an action against the first and the second defendant, by which action they sought for an order for specific performance of the 12 agreements, liquidated damages at the rate of 11% of the total purchase price from 29 August 2000 until date of delivery of vacant possession. Alternatively, for rescission of the 12 agreements, restitution of the total purchase price including interest at the rate of 11% on the total purchase price from 28 August 1997 to the date of realisation.

[16] Paragraphs 4 to 9 of the statement of claim filed relates to the first defendant, describes the contractual relationship between the first defendant and the plaintiffs, and the alleged breaches committed by the first defendant. In paragraph 16 the plaintiffs alleged that by reason of the second defendant having taken over the rehabilitation of the development project from the first defendant pursuant to the transfer agreement, the 12 agreements were binding on the second defendant, inclusive of the obligation to deliver vacant possession of the properties purchased within 36 calendar months of execution of the 12 agreements. It was then contended that the second defendant was liable to pay the plaintiffs loss and damages in the same terms as that claimed against the first defendant. Further and in the alternative, the plaintiffs alleged that the second defendant, having taken over the

development project from the first defendant as developer, owed them a duty of care to ensure that their acts or omissions does not adversely affect any of their rights, title and interest in the said properties under the 12 agreements.

[17] It was then alleged that, by reason of the plaintiffs having paid the total purchase price of the properties amounting to RM2,316,580 to the first defendant, (letter dated 17 October 1997 of the first defendant to the plaintiffs was to be accepted as proof that such payment had in fact been made), by reason of the first defendant's refusal to inform the plaintiffs as to when vacant possession of the said properties purchased were to be delivered, as well by reason of the failure to deliver vacant possession of the said properties within 36 calendar months from execution of the agreements, they had suffered loss and damage entitling them to liquidated damages at the rate of 11% per annum of the total purchase price of RM2,316,580 from 29 August 1997 until the date of delivery of vacant possession.

[18] Vide encl (7) filed on 24 April 2006, the plaintiffs sought to enter summary judgment under O 81 of the RHC against both the first defendant and the second defendant for specific performance of the 12 agreements; alternatively, for the 12 agreements to be rescinded. The plaintiffs elected, by their solicitor's written submissions, to seek for an order in terms of the alternative prayer for rescission, and not that for specific performance, and other consequential orders.

[19] The judicial commissioner relied on cl 38(f) and 41(a) of each of the 12 agreements, ie the definition of 'vendor' as including 'successors in title and permitted assigns'. She ruled that cl 41(a) was binding on the second defendant as the first defendant's 'successors in title and permitted assigns'. She was of the considered opinion that by reason of the lands in Annexure A to the transfer agreement being the same lands upon which the said properties were to be erected, and by reason of the plaintiffs having paid the full purchase price to the first defendant, the fact that the plaintiffs' name was not listed in Annexure H annexed to the transfer agreement was not a sufficient ground to displace the plaintiffs' claim.

[20] In his submission counsel for the second defendant stressed the fact the second defendant was not a party to the 12 agreements, which fact, according to him, had not been given due consideration by the judicial commissioner. There was, on the facts of this case, no contractual relationship between the plaintiffs and the second defendant. On the facts of this case the purchase price was paid to the first defendant, not to the second defendant. He submitted that the judicial commissioner had therefore erred in making the second defendant jointly and severally liable to reimburse the sums paid by the plaintiff to the first defendant. He submitted that in this situation,

whether the second defendant was liable to reimburse the sums of which they were not a recipient of, constitutes an issue to be tried.

[21] The second defendant's counsel further submitted that the judicial commissioner was in error in construing the terms of the transfer agreement. Annexure H of the transfer agreement must necessarily be read to mean that the first defendant had represented to the second defendant that the purchasers of the development project were that as listed in Annexure H. Encik Kirubakaran pointed out that the plaintiffs was not listed as one of the first defendant's purchasers in Annexure H. By reason of this omission he submitted that the second defendant had accordingly not been put to notice of the plaintiffs' alleged interest in the said lands. Further, the fact that a novation agreement had not been executed between the first defendant, the second defendant, and the plaintiff (as the first defendant's purchasers), as envisaged by Recital K and cl 4(e)vii of the transfer agreement, was a material factor which had not been given due consideration by the judicial commissioner. On the issue of liability of the second defendant towards the plaintiffs by reason of the obligations under the 12 agreements not having been novated, is also a triable issue.

[22] As for the definition clause, 'vendor' 'includes its successors in title and permitted assigns …' and cl 41(a), he submitted that the second defendant, in their capacity as a 'rehabilitating developer', cannot be construed to come within the ambit of the definition of being the 'successors in title and permitted assigns of the first defendant'. This, was also a trible issue.

[23] As to the interest rate awarded by judicial commissioner of 11% per annum from 28 August 1997, Encik Kirubakaran stressed the fact that although courts have recognized that a successful litigant who had been kept out of monies lawfully due to them is entitled to be awarded interest, the interest rate awarded is only 8% per annum upon the judgment sum from date of the issuance of the writ, and the rate awarded of 11% in this case has never been ordered by the courts in the absence of an express provision to that effect in the agreement in issue.

[24] In reply, the plaintiff's counsel submitted that the judicial commissioner was right in holding that there was no issue to be tried, be it on facts as well as in the law, and in issuing the orders which she did. He submitted that the fact that the second defendant had executed the transfer agreement which they did, makes the second defendant, jointly and severally liable with the first defendant for the breaches that had occurred, as the second defendant came within the definition of 'vendor' as the 'successors in title and permitted assigns' of the first defendant.

[25] He argued that the contention that the second defendant's obligation was only towards purchasers listed in Annexure H of the transfer agreement was untenable as the second defendant, in their capacity as a rehabilitating developer, was required to rehabilitate and develop the whole development project, and not confined to the individual purchasers of the first defendant specified in Annexure H.

[26] Having paid to the first defendant the sums due under the 12 agreements, and in view of the clear breach of the first defendant's obligations to complete and surrender possession of the properties purchased within the time frame of 36 months, entitled the plaintiffs to rescind the 12 agreements, and be reimbursed the sums paid to the first defendant, which obligation lies not only upon the first defendant, but also by the second defendant, jointly and severally, consequential upon the execution of the transfer agreement.

[27] I am of the view there are clearly issues to be tried in this case. Liability of the second defendant towards the purchasers of properties from the original developer, to which the second defendant was not a party of, cannot totally be ignored, especially when read in the context of the plaintiffs not being listed as one of the purchasers of the first defendant in Annexure H.

[28] I am of the view that the mere fact that a transfer agreement had been executed between the first defendant and the second defendant does not per se makes the second defendant jointly and severally liable towards the plaintiffs for breaches committed by the first defendant in the first instance. It must necessarily be read in context of terms agreed upon, as between the original developer, the rehabilitating developer, as well as the particular purchaser concerned. The non listing of plaintiffs in Annexure H, as well as the fact that there has been no novation of the agreement as envisaged by the transfer agreement, clearly has an impact on the issue of whether the second defendant is liable toward an unfortunate purchaser caught in such situation.

[29] I accordingly find that this is not an appropriate case for summary judgment to be entered against the second defendant. The second defendant has convinced me there are bona fide issues to be tried as far as the plaintiff's claim against the second defendant is concerned. It is my finding that the learned judicial commissioner had erred in making the orders which she did.

[30] For the reasons above mentioned, this appeal is allowed with costs. The decision of the judicial commissioner is set aside and this case be remitted back for trial. The deposit to the appellants.

Abdull Hamid Embong JCA (delivering majority judgment of the court):

[31] This is the majority judgment of this court. My learned brother Tengku Baharudin Shah JCA has agreed with this judgment in draft and consented that it be our judgment.

[32] In this judgment the parties shall be referred to as the plaintiff and second defendant as they were in the court below. We had, in the majority, dismissed this appeal and affirmed the decision of the learned judicial commissioner in allowing for a summary judgment to be entered under O 81 of the RHC.

FACTS

[33] The salient facts as agreed were as follows:

1 The plaintiff (respondent here) and the first defendant (not a party in this appeal) entered into 12 sales and purchase agreements ('SPA') all dated 28 August 1997, purchasing various commercial properties in a project ('the project') developed by the first defendant on its lands in Butterworth for a total purchase price of RM2,316,580.

2 The purchase price was paid in full to the first defendant, and was duly acknowledged by first defendant.

3 Some of the pertinent clauses in the SPA are these —

(a) time shall be the essence of the SPA (cl 7);

(b) the first defendant shall at its own cost and expense apply for subdivision of the building so as to obtain the issue of a separate strata title to the properties under the Strata Titles Act 1985 (cl 10(a));

(c) upon the issuance of the separate title to the properties and subject to the payment of all monies due under the SPA by the plaintiff to the first defendant and the observance of all terms and conditions provided in the SPA, the first defendant shall execute valid and registrable transfer of the separate strata title of the properties to the plaintiff, its heir or nominee or lawful assign, as the case may be (cl 10(b));

(d) vacant possession of the properties shall be handed over to the plaintiff within 36 calendar months from the date of the SPA (cl 20 (a))

(e) if the first defendant fails to hand over vacant possession of the properties in time, the first defendant shall pay to the plaintiff liquidated damages to be calculated from day to day at the rate of 11% per annum of the total purchase price of the properties (cl 20 (b));

(f) the 'Vendor' includes its successors in title and permitted assign (cl 38 (f));

(g) the SPA shall be binding upon the successors in title and permitted assigns of the first defendant and the heirs, personal representatives, successors in title and permitted assigns of the plaintiff (cl 41).

4 Subsequent to the execution of the SPA the plaintiff entered several private caveats against the lands pending completion of the SPA.

5 The first defendant later abandoned the Project, thus breaching the express term in the SPA to deliver vacant possession within 36 months from the date of the SPA.

[34] The plaintiff contended that it suffered loss and damages calculated as agreed at 11% of the total purchase price already paid from 29 August 2000. The plaintiff sought for damages or alternatively prayed for a rescission of the SPA and a return of the total purchase price of RM2,316,580 with interest at 11% from 28 August 1997 till date of full realization.

[35] On 20 September 2000 the first defendant and the second defendant (the appellant here) entered into a transfer agreement wherein some of the relevant recitals are now listed:

3.1 CDSB (ie first defendant) is the registered proprietor to all those pieces of land more particularly referred to and described in Annexure A hereto (the land).

3.2 Pursuant to a private title search conducted on 3 August 2000, there are numerous private caveats lodged by individuals, corporation and financial institution over the land to protect their respective interests. The particulars are described in Annexure C hereto.

3.3 CDSB is desirous of developing the land into a township consisting inter alia of commercial, residential, mega mall and budget hotel known as Raja Uda Commercial Centre (CDSB has partly developed the land into four (4) storey shop-office).

3.4 CDSB commenced development of the Project in 1996 and has abandoned the project since 1998.

3.5 By a letter dated 27 July 2000 addressed to CDSB, MBSB (the financiers) has agreed with CDSB's proposal in granting WDSB (i.e second defendant) the rehabilitation and completion of the Project … whereby CDSB will transfer the land to WDSB subject to the existing charges created in favour of MBSB without any money consideration.

3.6 To achieve the objective, the parties together with MBSB further agreed to enter into inter alia the following Agreement immediately upon execution of this agreement on terms mutually agreed upon.

3.7 CDSB has by separate and individual sale and purchase agreements made with the individual purchasers details of which are more particularly described in Annexure H, agreed to sell and transfer their rights and title to and interest in the relevant Unit erected or to be erected on part of the land (the Unit) to the individual purchasers upon payment of the full purchase price and the terms and conditions stipulated in the S&P.

[36] The summons in chambers filed by the plaintiff seeking for a summary judgment under O 81 of the RHC was not opposed by the first defendant.

[37] The second defendant, in its opposing affidavit however stated the following points which its learned counsel before us adverted to as raising a bona fide issue to militate against granting a summary judgment. They are:

5.1 Saya dinasihatkan oleh peguamcara defendan kedua dan sesungguhnya percaya bahawa plaintif tidak mempunyai sebarang kausa tindakan serta pertalian kontrak ('privity of contract') terhadap defendan kedua.

5.2 Saya mengatakan bahawa adalah menjadi syarat dan terma perjanjian tersebut defendan kedua akan menyempurnakan kerja-kerja pembinaan projek tersebut dan menyempurnakan obligasi kepada pembeli- pembeli dalam projek tersebut di mana senarai pembeli diberikan oleh Defendan Pertama yang dilampirkan perjanjian tersebut dalam annexure 'H'.

5.3 Saya seterusnya mengatakan bahawa nama plaintif tidak disenaraikan.

5.4 Defendan Kedua hanya bertanggung-jawab terhadap pembeli-pembeli yang disenaraiakan sahaja dan bukan kepada pihak-pihak yang tidak disenaraikan tersebut.

[38] Before us, learned counsel for the second defendant, raised the same issue namely that there was no contractual relationship, and as such no privity of contract, between the plaintiff and the second defendant by reasons that firstly, the plaintiff's name did not appear as a purchaser in Annexure H and

that secondly, there was no novation agreement entered into between the plaintiff, the first and second defendants

[39] The learned judicial commissioner having perused and considered all the relevant documents supporting the plaintiff's claim came to this conclusion –

> Save for the fact that the second defendant denies liability to the plaintiff under the agreements for the reason that it is not privy thereto, it has not denied that it is the successor in title and permitted assigns of the first defendant.
>
> The second defendant had relied on Annexure H of the transfer agreement to disclaim liability to the plaintiff. Given the fact that the lands referred to in Annexure H of the said transfer agreement are the same lands averred to by the plaintiff as being the lands upon which the properties are to be erected and purchased by the plaintiff, and given the fact that the purchase by the plaintiff had not been denied and neither has the payment of the full purchase price, it is my view that Annexure H is not sufficient to displace the plaintiff's claim.

THE LAW

[40] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, the Supreme Court had succinctly formulated the principles to guide a judge in deciding whether or not to grant a summary judgment when it held in the following terms:

(1) In an application under O 14, the court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need only show that there is a triable issue.

(2) Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

(3) Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the

court is satisfied it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand.

[41] The Supreme Court also accepted and applied the principle as enunciated by the Privy Council in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 where Lord Diplock in his advice stated:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under s 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong.

[42] When an issue of fact is raised in an affidavit opposing an application for a summary judgment the trial judge thus is duty bound not to merely accept it superficially and in a cursory manner. He is not bound to accept any allegation uncritically. In exercising his judicial discretion the judge is obliged to critically examine any assertion of fact and to do so in a fine-toothcomb manner if need be to determine if it were a bona fide factual dispute worthy of determination at a full trial.

[43] We are also reminded that O 81 of the RHC is a summary judgment procedure and not a summary trial procedure (see *Ng Hee Thong v Public Bank Bhd* [1995] 1 MLJ 281).

[44] In *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183, it was held that a summary judgment procedure under O 14 of the RHC is not intended to shut out a defendant and should only be exercised in clear cases. We also adhere to this principle in coming to our decision. It must be emphasised conversely, that a plaintiff should not be put through the long-drawn costly process of a full trial in an action against a defendant who is without a bona fide defence. This is the philosophy behind a summary judgment procedure.

A WHY WE DISMISSED THIS APPEAL

[45] This application was made under O 81 of the RHC. Order 81 r 3 of the RHC states that:

B

> Unless on the hearing of an application under rule 1 either the court dismisses the application or the defendant satisfies the court that there is an issue or question in dispute which *ought* to be tried or that there *ought* for some other reason to be a trial of the action, the court may give judgment for the plaintiff in the action.
>
> (Emphasis added.)

C

[46] The plaintiff in a summary judgment application first needs to establish and prima facie case that 'he is entitled to judgment'. The burden then shifts to the defendant to satisfy the court why judgment should not be D given against him (see *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 302 per Seah FJ). 'Ought' in O 81 r 3, is an expression of a strong probability. In other words, the issue in dispute must be critically investigated and be determined as genuine. This is what a defendant needs to prove to be entitled to a trial of that disputed issue.

E

[47] A judge in allowing for a summary judgment under O 81 of the RHC, does so in the exercise of his discretionary jurisdiction. He may enter a judgment for the plaintiff or allow leave to defend the action. If an appellate court finds that this discretion had been judicially exercised in the sense that F he had properly evaluated the facts to find no arguable case, and had not been wrong in law or erred in principle, then the judge's decision should not be disturbed here. (see *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; *Eng Mee Yong & Ors v Letchumanan*.

G **[48]** In *Doshi v Yeoh Thiong Lay* [1975] 1 MLJ 85, the Federal Court in allowing for a summary judgment under O 14 of the Rules of the Supreme Court 1957, had this to say (per Gill CJ at p 89):

> I must say in conclusion that an order made by a judge in the exercise of his H discretion cannot be disturbed by this court unless it can be shown that in the exercise of such discretion he acted contrary to recognized principles. (See *Culver v Beard* [1937] 1 All ER 301, 306.) As Lord Denning MR said in *Hodges v Harland & Wolff Ltd* [1965] 1 WLR 523, 526. When a judge exercises a discretion and takes all the relevant considerations into account, it is well settled that the burden is on anyone coming to this court to show that he was wrong. I can see nothing wrong I in the way in which the learned judge dealt with this case in ordering final judgment to be entered against the appellant.

[49] In this appeal, we are of the view that the learned judicial commissioner had correctly approached this application by minutely considering and evaluating all the relevant documents and facts in coming to her decision. Her Ladyship had also concluded that the statements of the second defendant in its opposing affidavit are inconsistent with contemporaneous documents. We find that she had properly exercised her discretion in allowing the plaintiff's action; and that finding should not be upset.

[50] It is noted, as submitted by learned counsel of the plaintiff, that the second defendant had never disputed that they are the successors in title and the permitted assigns of the first defendant. Thus, by virtue of cll 41 and 38(f), the SPA is binding upon the second defendant.

[51] Under the transfer agreement, the second defendant has unequivocally accepted and is obliged to 'rehabilitate continue to carry out the development, construction and completion of the project.' We think that it matters not if the plaintiff's name is or is not listed in Annexure H. The breach for which the plaintiff is now seeking its remedy is for the failure of the second defendant to complete this project and for the non-delivery of the commercial units to the plaintiff, the purchase price of which had been fully paid. In our view to say that there is no privity of contract between the plaintiff and the second defendant is untenable. It is not a bona fide issue worthy of trial.

[52] As regards to non execution of the novation agreement point, we agree with the plaintiff's stand that this is an issue of fact and not law. It is thus incumbent upon the second defendant to show that the other purchasers had entered into such an agreement. The second defendant had not adverted to this fact in its affidavit in opposition. Furthermore under the transfer agreement, it is the second defendant who is obliged to prepare this novation agreement within 30 days of signing the transfer agreement with the first defendant. This was never done. We would also rule that since this is a fact not asserted or argued before the High Court it should not now be raised in appeal (see *Maharlal Bhaichand Gathani v Perwira Habib Bank Malaysia Bhd* [2002] 1 CLJ 449). However having heard submission on this point we found that it came to nothing.

[53] Further, the second defendant had duly acknowledged and confirmed that pursuant to a private title search on 3 August 2000 it was aware of the numerous private caveats lodged, including the plaintiff's. The effect of the plaintiff's private caveat under our National Land Code is to give notice to the whole world that it had a claim or an interest in the land (see *United*

Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors [1976]1 MLJ 169). The second defendant cannot now plead ignorance of this fact.

[54] In fact, before the commencement of this action the second defendant had on 18 February 2005 requested the plaintiff to remove its caveats. The plaintiff did not object to that request and had in turn asked the second defendant to give an undertaking to, inter alia, issue to it separate strata titles and to deliver forthwith vacant possession of the purchased properties if they are ready for delivery.

[55] In our considered view this novation agreement issue is also non triable.

[56] For these reasons, this appeal is dismissed with cost, and the order made by the High Court for a summary judgment in the alternative prayer is confirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon